HON'BLE SRI JUSTICE GODA RAGHURAM

W.P.NO. 3761 OF 2007

DATED: 27.2.2007

Between:

M/s.Bhargavi Traders, rep. by its proprietor Kodumuri Jagadish

.Petitioner

and

The Deputy Tahsildar, Khammam and others

…Respondents

THE HON'BLE SRI JUSTICE GODA RAGHURAM

W.P.NO.3761 OF 2007

ORAL ORDER:

The validity of G.O.Ms.No.64, dated.23-09-2006 is in question in this writ petition as well as the action of the 1st respondent by the order dated 17.2.2007 seizing stocks of red gram and green gram in quantities of 1247.47 and 94.01 quintals respectively, from the godown of the Central Warehousing Corporation, belonging to the petitioner. The petitioner seeks a consequent direction to the respondents not to proceed further to the seizure.

In exercise of the powers available under Section.3 of the Essential Commodities Act 1955 ('the Act') read with a complementary order of the Government of India in GSRNo.800 Dated.09-06-1978 and other enabling powers, the State Government issued the AP Scheduled Commodities Control (Licensing and Distribution) Order 1982 ('the 1982 Control Order'). The Control Order was operational until the State Government published on 11.09.2004 its order in G.O.Ms.No.67

dated 2.9.2004 rescinding the 1982 Control Order. This order of rescission was issued in the light of the order of the Government of India in GSR No. 104(E) dated 15.2.2002 as amended in GSR.No.490(E) dated 16.6.2003.

By the impugned order (G.O.Ms.No.64) the State Government exercising the available power under Section.3 of the Act, "*kept in abeyance to the extent of pulses (whole and split) for a period of six months from the date of publication of the notification in the AP Gazette or further orders whichever is earlier*" and subject to the specified conditions, the earlier order issued in G.O.Ms.No.67 (whereby the 1982 Control Order was rescinded). G.O.Ms.64 was notified by publication in AP Gazette on 23.9.2006. As a consequence the previous Control Order became operational *proprio vigore* w.e.f. 3.9.2000. On the admitted factual scenario the petitioner failed to obtain a license under the 1982 Control Order and was pursuing the business contrary to the control architecture resuscitated by the issuance of G.O.Ms.64. As a consequence the 1st respondent on 17.2.2007 seized the specified commodities belonging to the petitioner which were stored in the godown of the Central Warehousing Corporation, on the ground of transgression of the

provisions of the Control Order. An auction notification was issued on 24.2.2007 proposing sale of the seized commodities of the petitioner. The sale is scheduled on 22.2.2007. This process of sale is presumptively in exercise of powers Under Section.6-A(2) of the Act.

The challenge to the seizure and to the eventual sale notified by proceedings dated 24.2.2007 is normatively on two broad grounds: (A) that the order of the State in G.O.Ms.No.64 is invalid as it seeks to revive a rescinded Control Order instead of reissuing the Control Order *de novo*; and (B) that the notification for sale of the seized commodities is issued without recording an opinion of satisfaction as mandated by the provisions of Sec.6-A(2) of the Act. It requires to be noticed that the petitioner has not pleaded the invalidity of the sale notification on the ground that no satisfaction as required u/Sec.6-A(2) was recorded. This is a contention orally urged at the hearing but a contention that proceeds on a reading of the text of the sale notification *vis-à-vis* the provisions of the Act. This being a legal plea, this Court has afforded an opportunity to the respondents to produce any contemporaneous record that discloses the opinion.

Mr. Vedula Srinivas the learned counsel for the petitioner would contend on aspect-(A) that in as much as the Control Order was rescinded in G.O.Ms.No.67, the Control Order stood wholly effaced and extinguished and does not subsist for revitalization by the issuance of G.O.Ms.No.64. This contention is without merit or force. It requires to be noticed that it is not the case of the petitioner that the impugned G.O.Ms.No.64 was issued by an authority incompetent to issue the Control Order in terms of Sec.3 of the Act. Such competence is admitted though equivocally. What is contended is that since the Control Order was rescinded by the order in G.O.Ms.67, there was no Control Order in physical existence that could be revived by issuing an order keeping the earlier order of rescission in abeyance. This contention is based on tautology rather than logic.

There is no ordained drafting principle that requires a legislature or a statutory authority to use a particular set of words or adopt a mandated linguistic formula to express the legislative or statutory intention. The Control Order was rescinded by issuance of G.O.67. As a consequence the provisions of Control Order became inoperative. It is not as though the Control Order got oblirated from the physical space

as to have become irretrievable by employing the appropriate legislative and drafting measures. By the impugned G.O. the State Government by employing the phraseology, of keeping its earlier order (in G.O.67) in abeyance clearly notified the intent of reoperationalising the 1982 Control Order. That is the intendment of G.O.Ms.No.64, clearly and unambiguously. The impugned Order may at best be criticized as an inelegant piece of drafting but cannot be gainfully impeached. It was physically possible to retrieve and jurisdictionally permissible for the State to reoperationalise the Control Order by exercising powers u/Sec.3 and other enabling powers. The argument on behalf of the petitioner that the State could only have reenacted the control order and not kept the earlier order in G.O.67 in abeyance, is an argument that has no substance or force and such tautology shall not interdict the substantive purposes of the control architecture enabled to the State u/Sec. 3 of the Act. This contention is accordingly rejected.

The second aspect of the challenge in this writ petition is to the proposed auction on the ground that the authority has failed to express the satisfaction and opinion that the essential

commodities in question are either subject to speedy and natural decay or it is otherwise expedient in the public interest to order the same to be sold at the controlled price or in a public auction.

Sec.6-A of the Act sets out the powers in relation to confiscation of an essential commodity. It is provided that where any essential commodity is seized pursuant to the Control Order made u/Sec.3, a report of such seizure shall expeditiously be made to the Collector of the district and whether any prosecution is initiated for contravention of a Control Order, the Collector may, if he thinks it expedient to do so, direct the essential commodity so seized to be produced for inspection before him, and if satisfied that there has been a contravention of the order, may order confiscation of the commodity. Sec.6-B mandates that no order of confiscation enabled u/Sec.6A shall be made unless, *inter alia*, the owner of such essential commodity or the person from whom it is seized, is given a notice; an opportunity to make a representation in writing within a reasonable time; and a reasonable opportunity of being heard in the mater. Sec.6-C engrafts an appellate remedy *inter alia* against an order of confiscation.

It is the agreed fact situation in this case that no order of confiscation has yet been passed. The commodities from the petitioner's custody were only seized. They are therefore proposed to be sold by the issuance of the notification dated 24.2.2007. The offered justification for exercise of this power of sale is the enabling power Under Section.6-A(2).

Sec.6A(2) provides that when the Collector on receiving a report of seizure or on inspection of any essential commodity under sub-sec.(1) "*is of the opinion that the essential commodity is subject to the speedy and natural decay or it is otherwise expedient to do so*," he may *inter alia* order the same to be sold at the controlled price or when no such price is fixed, by public auction. The power conferred under sub-section.2 of Sec.6-A is a power that is available to be exercised alternate to the normal flow of statutory power i.e., post confiscation. Having regard to the fact that the power is conferred in an alternative exigency, the legislature on a balancing of public and private interests has ordained that there should be, as a condition precedent, an opinion by the Collector that the essential commodity is required to be sold (even before an order of confiscation is passed), since it is subject either to speedy and natural decay or it is

otherwise expedient in the public interest so to do.

In the considered view of this court the existence of a rational opinion by the Collector is a mandatory condition precedent to the exercise of the alternative choice (of the sale of essential commodity even before the order of confiscation is passed). The reason why this court considers it mandatory is that the Legislature has not conferred an unannotated power, of unlimited plenitude. It is a controlled power and controlled by the prescription of the existence of an opinion that should be exercised within the legislatively defined *locus*. If it were not to be so interpreted (that the existence of opinion is mandatory), it would have the inevitable consequence of converting a limited power into an unlimited power, a statutory controlled discretion into a whim. Such is not the purpose for which the Legislature has engrafted conditions upon exercise of power. Where there is neither a circumstance of speedy and natural decay of the commodity in question nor a circumstance of expediency in public interest, the power u/Sec.6-A of the Act cannot be exercised. This much is clear, textually.

The provision mandates that the opinion should be of the Collector. The Collector is defined [in Sec.2(ia) of the Act] as

including an Assistant Collector and such other officer not below the rank of a Sub-Divisional Officer as may be authorized to perform the functions and exercise the powers of the Collector under the Act. From the conferral of power to the specified, defined authority, the legislative signal is compelling that the Collector as the executing authority exercising jurisdiction within a referentially delineated part of the State, is required to be satisfied and form the opinion as to the specified circumstances. The legislative purpose of investing the obligation on a Collector (of forming an opinion) appears to be that the opinion should be formed in the context of the circumstances specific to a territory within the jurisdiction of the Collector and not the whole of the territory of the State. A particular commodity may be subject to speedy and natural decay or not, the need for sale of a particular essential commodity even before its confiscation may be expedient in the public interest or not in the territory within the jurisdiction of Collector and not necessarily in the entire State. It is such geospecific circumstance or expediency that should fertilize the rational choice and opinion of the Collector, i.e., as to the existence of the legislatively specified circumstance and/or

expediency, legitimizing the formation of the opinion, to sell the essential commodity before an order of confiscation. Such territory specific opinion of the Collector cannot be substituted by an opinion of an authority having jurisdiction over the entire State as that would subvert the legislative purposes of Sec.6A(2). At one level it would amount to abdication of the legislative obligation by the Collector and usurption of the Collector's discretion by the State level authority and at another level (of scrutiny) it would substitute the exercise of State level discretion with that of the designated authority-the Collector.

The above interpretation of the legislative intent and purpose is compelling since it is possible that even on the aspect of speedy and natural decay the potentiality may be different in different regions within a State. In a large State the climatic conditions may differ from territory to territory, making it possible for speedy decay in a particular area and not in another. It must not be forgotten that this is a federal legislation. The climatic conditions in Kolkutta could be widely divergent from those in Darjeeling. The conferral of the power by the Central Act on a Collector is a deliberate legislative choice that

takes notice of the vast diversity of circumstances climatic economic or otherwise, of this continent sized Nation.

The sale notification dated 24.2.2007 issued by the Tahsildar, Khammam (Urban) neither expressly nor by any compelling implication refers to an opinion formed by the Collector, a mandate of Sec.6-A(2).

The learned Advocate General has placed before this Court the proceedings of the Collector and District Magistrate, Khammam (R-2) bearing reference No. MC 24/07, dated 20.02.2007, which reads as under:

> **"ORDER:**
>
> The Dy.Tahsildar (CS), Khammam (U) has reported that on 15-02-2007 and 17-02-2007, he along with C.I, Vigilance, Tahsildar Vigilance and mediators surprised the A.P. State Warehousing Corporation situated in Khammam Town, noticed that M/s.Sai Srinivasa Industries, Khammam has stored 589.05 Qtls of green gram without any valid license and violated the clause 3 of the APSCD(L&D) Order, 1982 and seized the ground stock of 589.05 Qtls of green gram worth of Rs.17,67,150/- under cover of panchanama and submitted a report under Section.6-A of the E.C.Act,1955.
>
> Pending finalization of 6-A proceedings, it is ordered that the seized stock of 589.05 Qtls of green gram worth of Rs.17,67,150/- available with Warehousing Manager, A.P.State Warehousing Corporation, Khammam, be allotted to the Mandal Revenue Officer, Khammam(U) with instructions to take the above stocks from the custodian urgently, dispose the same in open auction to any licensed whole sale dealer nor below the reported price by giving wide publicity, at the above value and

remit the sale proceeds into Revenue Deposits.

The Mandal Revenue Officer, Khamam(U) shall submit the challan and auction papers etc., to this Office urgently for record.

Sd/- Shashi Bhushan Kumar
Collector and District Magistrate,
Khammam."

It is submitted on behalf of the respondents by the learned Advocate General that as the 2nd respondent had directed that pending finalisation of Sec.6A proceedings, the seized commodities must be allotted to the MRO for the purpose of disposal in open auction to any licensed wholesaler, it must be presumed that the Collector had formed an opinion as mandated by Sec.6-A(2).This contention does not merit acceptance. Neither textually nor on any deducible implication from the text is it legitimate to infer that the Collector had formed an opinion either as to the speedy and natural decay or the expediency in the public interest, to sell the commodity seized even before an order of confiscation is passed u/Sec.6A. Such opinion, even by a process of speculation does not follow. Short of psychoanalysis of the Collector, this court fails to discern any physical mechanism for inferring such an opinion having been formed, from the order of the Collector dated 22.02.2007 (extracted above).

Alternatively, the learned Advocate General suggests that in view of the order of the Government (Ex-Officio Secretary of the Government) issued in memo No.216 dated 22.2.2007 it must be inferred that an opinion was arrived at that the sale of the seized commodities (even before an order of confiscation is passed), is expedient in the public interest. This contention also does not commend acceptance by this court.

Reliance is placed on the direction issued in Para-3, of the Government memo dated.22-02-2007 which reads as under:

> " 3. Further, it is also informed that a detailed clarification has already been issued to all Collectors about the procedure to be followed for interim disposal of seized stocks vide CCS.Ref.No.P5/1983/1984 dated 11-4-1985. The same is reproduced below for information.
>
> " With a view to have a uniform policy, Government ordered that the following instructions in the interim disposal of seized commodities may be followed to be in conformity with the provisions of the Essential Commodities Act,1955.
>
> i) In so far as essential commodities that are being distributed through the Public Distribution System are concerned, they may be released though the Public Distribution System for ensuring equitable distribution at fair prices.
>
> ii) <u>In cases where commodities are not distributed through Public Distribution System, they may be got disposed of, through an interim direction, only through public auction and the sale proceeds kept in the deposit as observed by the Supreme Court. Release of commodities to the same persons from whom they were seized would definitely defeat the purpose and spirit of the provision of the Essential</u>

> Commodities Act, and may encourage parties unauthorizedly moving stocks and other essential commodities outside the State. Not releasing stock to the same persons will act as a deterrent as against the activities of the dealers and other who indulge in clandestine activities of smuggling etc., "

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The guidelines set out in Para-3(ii) record some reasons for not releasing the stock to the same person (from whom it was seized) i.e. such a course of action would be a deterrent against repetition of similar activities by the dealer. But there is nothing even in the guidelines, which explicates the reasons for forming an opinion that either the seized commodities are subject to speedy and natural decay or it is expedient in the public interest that they be sold even before an order of confiscation is passed. At any rate the State level decision of the Ex-Officio Secretary to the Government is not what is intended by the legislative mandate. The statute mandates the formation of an opinion by taking into account the conditions specified in the Act by the Collector, an executive authority operating within a specified territory within the State.

In extremis, the learned Advocate General would suggest that judicial notice must be taken of the fact that there is a large scale hoarding of pulses which has resulted in the deprivation

of these essential commodities for consumption by the general public; judicial notice must be taken of the fact that it is potential of such a misuse which has legitimized the exercise of the power by the State in issuing G.O.Ms.No.64; judicial notice must be taken that the seizure is effected as an executive measure in exercise of the control architecture in G.O.64 to alleviate the public misery consequent on the hoarding of stocks; and that on cumulative notice of all these facts the judicial branch must assume/presume the existence of circumstances legitimizing the sale of the essential commodity even before an order of confiscation is passed. This contention does not pass scrutiny either.

The failure of the Collector to form an opinion and record in the manner verifiable at law cannot be substituted by speculative assumption by the judicial branch of circumstances, which legitimize the exercise of power.

A conditional power has been conferred on the executive authority by the Legislature and unswerving executive fidelity to such mandate, under our constitutional scheme, demands that the executive exercises its powers within the spectrum of the limited and conditioned power conferred. Executive over-reach

of legislative limits ought not to be glossed over by contrived interpretive exercises, as that would facilitate regressive executive conduct – arbitrariness and the like. A larger constitutional value, of a limited executive, operating within the locus of the legislative mandate is in issue, a core governance and structural issue.

If the Collector has, as in this case, failed to record an opinion as to the existence of circumstances which justify the sale of the seized commodity (even before an order of confiscation is passed), transgressing the commend of Sec.6-A(2) of the Act, such deficiency is remedied easily and without effort and public expenditure by the Collector now forming an opinion and recording it in an order. The suggestion on behalf of the respondents that these "*creases in the Collector's order should be ironed out,*" is a contention that is stated to be rejected. An order of the Collector is not the product of great structural complexity or an elaborate and protracted ritual that it must be saved even if invalid by exercising the "ironing out technique", by the judicial branch. It is by an instrument by a mere executive authority which could be reissued without much

expense, delay or elaborate procedure. The purposive construction tool is more appropriate to the construction of legislative instruments. Normally a facially and explicitly invalid executive instrument must perish and ought not to be saved by contrived interpretation.

For all the aforesaid reasons this court;

(a) Rejects the petitioner's challenge to the validity of G.O.Ms.No.64 dated 23.9.2006;

(b) Declares that the 1982 Control Order is *propio vigore* revitalized by the issuance of the order in G.O.Ms.No.64 dated 23.09.2003 and for the period for which it is revived;

(c) Declares the seizure of the specified commodities by proceedings of the 1st respondent dated 17.2.2007 is valid and proper; and

(d) Declares that the order of sale by the notification dated 24.2.2007 is invalid as the Collector or the appropriate competent authority failed to arrive at and record the requisite, opinion contrary to the mandate of Sec.6A(2). It is however declared that it is open to the appropriate and competent authority including the Collector (in conformity with the observations and analyses in this judgment), to proceed from the stage of forming the appropriate opinion and recording it in a verifiable manner and to thereafter proceed to act in accordance with the decision arrived at on the basis of such opinion.

The writ petition is partly allowed as above. In the circumstances however there shall be no order as to costs.

GODA RAGHURAM,J

27TH FEBRUARY 2007
PVSN/*TSNR